

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

FEB 18 2005

CHRIS R. JOHNSON, CLERK

BY

DEPUTY CLERK

LAURA NEAL, in her capacity as
Parent, Guardian and Next Friend
of Justin Neal, and JUSTIN NEAL

PLAINTIFFS

v.

Civil No. 04-2195

JERRY EFURD, in his capacity as
Principal of Greenwood High School,
and GREEN SCHOOL DISTRICT

DEFENDANTS

and

RYAN DAVID KUHLE

PLAINTIFF

v.

JERRY EFURD, in his capacity as Principal
of Greenwood High School, JIM GARVEY, in
his Capacity as Assistant Principal of
Greenwood High School, and GREENWOOD
SCHOOL DISTRICT

DEFENDANTS

MEMORANDUM OPINION

On the 5th day of January, 2005, the captioned matter came on for trial to the Court. Plaintiffs, as well as defendants Jerry Efurd and Jim Garvey, appeared in person. Defendant Greenwood School District appeared through its authorized representative. All parties were represented by counsel. Based on the testimony and exhibits presented at trial, the transcript of testimony and the exhibits presented at a hearing before United States Magistrate Judge Beverly Stites Jones, and the arguments of counsel in briefs and at trial, the Court finds as follows:

1. The plaintiffs brought suit pursuant to 42 U.S.C. §1983, claiming that actions of the defendants violated their rights under

the First, Fifth, and Fourteenth Amendments to the United States Constitution, specifically by suspending the two student plaintiffs from school for the creation and operation of two internet websites. Their Complaints sought both preliminary and permanent injunctive relief, asking the Court to enter an order which would:

- * prohibit the District from further punishing the student plaintiffs for creating and operating the websites;
- * prohibit the District from excluding student plaintiffs from school or extracurricular activities because of the creation and operation of the websites;
- * prohibit the District from counting the student plaintiffs' suspensions as unexcused absences;
- * prohibit the District from putting derogatory remarks in the student plaintiffs' academic records;
- * prohibit the District from making any school record of the websites operated by the student plaintiffs;
- * prohibit the District from interfering with the student plaintiffs' chances to obtain scholarships;
- * prohibit the District from retaliating against the student plaintiffs for the websites; and
- * require the District to allow the student plaintiffs to make up work missed during their suspensions.

2. A hearing on the matter of preliminary injunctive relief was held before Magistrate Judge Jones on September 3, 2004, and her Report And Recommendation denying preliminary injunctive relief was

adopted by the Court. The matter of permanent injunctive relief is now pending.

3. All parties agreed that the transcript of testimony and the exhibits adduced at the hearing before Magistrate Judge Jones might be received into evidence on the issue of permanent injunctive relief, and they have been so received.

4. All parties waived jury trial on any fact issues that might need to be resolved in order to determine the issue of permanent injunctive relief, and consented to trial of all issues to the Court.

5. Before trial, the parties submitted an **Agreed Statement Of Facts** (document #22), and the facts recited therein are incorporated into the Court's findings of fact as set forth below.

FINDINGS OF FACT

6. Defendant Greenwood School District ("the District") is a duly authorized school district, having been established by the Arkansas General Assembly. It operates Greenwood High School, a public school in Greenwood, Arkansas.

7. At all relevant times, defendant Jerry Efurd ("Efurd") was the duly appointed Principal of Greenwood High School.

8. At all relevant times, defendant Jim Garvey ("Garvey") was the duly appointed Assistant Principal of Greenwood High School.

9. At all relevant times, plaintiff Justin Neal ("Neal") was a student at Greenwood High School. Plaintiff Laura Neal is Justin Neal's mother.

10. At all relevant times, plaintiff Ryan Kuhl ("Kuhl") was a student at Greenwood High School.

11. In August, 2004 -- shortly before the beginning of the 2004-05 school year -- Neal constructed on his home computer an internet website having the address <http://www.angelfire.com/comics/greentree/main.htm> (the "Neal Website"). Neal operated the Neal Website both before the 2004-05 school year began, and after school began on August 19, 2004.

12. At about the same time, Kuhl constructed on his home computer an internet website having the address http://www.xanga.com/home.aspx?user=F___ckGreenwood (the "Kuhl Website"). Kuhl operated the Kuhl Website both before the 2004-05 school year began, and after school began on August 19, 2004.

13. The Neal Website contained a hyperlink to the Kuhl Website and the Kuhl Website contained a hyperlink to the Neal Website.

14. Neither Neal nor Kuhl used school equipment to construct, maintain, or access their respective websites. Neither student plaintiff promoted his website at school.

15. Shortly before the first day of school, a parent called Efurd to complain about the two websites. The parent was upset about the way athletes and band members were portrayed on the sites, and about the bad language and "hateful comments" on the sites.

16. At Efurd's request, Garvey began an investigation of the websites on Monday, August 23. On August 24, Neal and Kuhl (along

with two other students who had posted messages to the sites but are not involved in this case) were taken out of class, questioned, and kept out of class for the rest of the school day. On August 25 the four students were suspended for a period of three days.

17. After the close of the school day on August 24, 2004, Efurd sent an e-mail to the high school faculty, stating that four students¹ had been suspended because of "threatening statements they made [on several websites] regarding a couple of staff members." He testified that this e-mail was intended to have a calming effect on the staff, but in fact it had the opposite effect.

18. Having viewed the websites, Efurd knew there were no threatening statements thereon made by either Neal or Kuhl. He also knew that, although his e-mail did not identify the students who had been suspended, the faculty would learn their identities as soon as school took up the following day, and that his e-mail would cause the staff to believe that Neal and Kuhl had made threatening statements on their websites. Although Efurd testified that he later corrected this impression about Neal and Kuhl verbally with staff, none of the faculty members who testified had any recollection of his doing so, and all remained under the impression at the time of trial that Neal and Kuhl had made threats on their respective websites.

19. The District furnished Neal with a written statement of

¹The four were Neal and Kuhl, and two unidentified students who had posted messages to the Neal and Kuhl Websites. The two unidentified students are not litigants before the Court.

the reasons for his suspension, to-wit: "1. Providing a website and linking the site to an inappropriate website than [sic] encouraged mayhem and dissension among GHS students. 2. Providing images of school administration conducting violence toward students."

20. The District furnished Kuhl with a statement of the reason for his suspension, to-wit: "Posting inappropriate web site. Inappropriate material on the web site."

22. Because of the limited degree of control a school district can exercise over off-campus student behavior, the testimony at trial understandably focused on the reasons behind the suspensions of Neal and Kuhl. Efurd testified that he did not think Neal and Kuhl were "dangerous" to the staff, but that he perceived a danger of disruption in the content of their websites. He testified that he was concerned that the sites might give offense and cause divisiveness among various groups at the school, which would be disruptive to the educational process.

Efurd also testified that the websites tended to "harass, intimidate, humiliate, or instill fear," which is the definition of "bullying" in the school handbook, and that school policy allows him to punish a student at school for conduct occurring outside of school.

Neither disruption nor bullying was advanced as a reason for the suspensions of Neal and Kuhl until after a lawsuit had been filed.

23. With regard to whether the websites caused disruption at

the school, the relevant testimony was as follows:

(a) Efurd testified that there was a "buzz" throughout the school the day after the investigation of the websites became known, but he conceded that any time a student is taken out of class and kept out, it creates a "buzz at school."

(b) Garvey testified that he was approached by some twenty students who were offended by vulgarities on the Kuhl Website, or concerned about "the depictions of violence," and that several teachers were concerned about how the websites were going to affect their performance in the classroom.² He also testified before Magistrate Judge Jones on September 3, 2003, that the matter was "the bulk of what has been going on in our school for the last week and a half," and that "our educational environment is no longer conducive to learning. It's conducive to this case, and it's conducive -- or not conducive -- it's focusing on this case and on the fact of the suspension." Garvey admitted, however, that it is difficult under normal circumstances to get students on task at the start of the school year, and that it usually takes a few days to shift into the learning mode.

(c) Neal testified that the first week of school was "normal," and that there was no discussion of his website. He further testified that he has observed no disruption at the school from the first day until the date of trial.

(d) Kuhl likewise testified that he saw no reaction to either

²None of the teachers who testified at trial had gone to an administrator about either website.

website, before or after the suspensions. He described the first week of school as "extremely normal, just like every other year."

(e) Amy Bridges teaches Spanish at Greenwood High School. She testified that personal safety is a teacher's greatest concern, and that the situation involving the websites has made her question whether she wants to continue teaching. She did not, however, notice any disruption among the students. She testified that school "has gone on in a normal way" and that student behavior was "remarkably the same." Bridges had not viewed either website, and her anxiety appeared to stem from rumors about their content.

(f) Jo Lynn Steel also teaches Spanish at Greenwood High School. She did not describe any disruptions before the suspensions, but testified that when Neal returned to class after his suspension, discussion levels dropped off in that one class, and have remained low. She attributes this to Neal's presence in the classroom, and testified that none of her other classes appears to be similarly affected. After learning of the websites, Steel testified that she had "concerns about physical aggression" because of the "state of society today," and that she worried about becoming a "target" of ridicule on the web. She had not seen either website, however, and, like Bridges, her anxiety appeared to stem from rumors about their content.

(g) Jo Ella Skaggs teaches American History and Journalism at Greenwood High School. She testified that one of her students was "kind of rowdy" the day of the suspensions, but that she calmed him

down and went on with her lesson. That rowdiness was not occasioned by the websites, but by the suspensions, which the student thought improper. Like Steel, Skaggs' concerns mainly centered on herself -- she did not want to "end up on a website." She testified that she did not want people being critical of her teaching style on a website. She had viewed only part of the websites, and while she was under the impression that Neal and Kuhl had made threats on the sites, this impression stemmed from the gossip of other teachers, not from anything she saw on the websites.

(h) Clay Brown teaches math at Greenwood High School. She testified that the first week of school was not as "quiet" this year as it was the year before, but that the only "disruptions" she observed took place between classes -- there was no disruption of the educational process in her classroom. The only specific disruption she described was one occasion when she observed a group of boys acting unruly in the lunchroom. She was unable to relate any disquiet to the websites or to the suspensions. She had not seen either website.

(i) Sonja Martin is the head of the Social Studies Department at Greenwood High School. From her perspective, the only disruptions were when the topic of freedom of speech in connection with the suspensions came up several times in her classroom, which occurred after the suspensions and after an article was published in the newspaper about them. She testified that all together she devoted maybe ten minutes to the subject. She did not allow any

substantive discussion of the First Amendment, informing the students that it was not appropriate. Martin thought that "something very serious" had happened because the principal would not have suspended the students unless the matter was serious. She believes that the content of the websites was threatening, but had not visited either website.

(j) Robin Elmore teaches English at Greenwood High School. She testified that the websites did not disrupt her classroom, but that she felt "some tension" when the subject of freedom of speech came up. Like Martin, Elmore refused to allow discussion of the subject. She had not viewed either website, and her understanding that the websites had threatening content arose from what other teachers and administrators had told her about them.

(k) Robin White is the receptionist and attendance clerk in the front office of Greenwood High School. One of her student aides showed her a comment that had been posted about her on the Kuhl Website. This comment was crude; it understandably caused her considerable mental anguish; and it made her feel very uncomfortable in dealing with the students involved in the situation. However, she understood that neither Neal nor Kuhl had posted the offensive message, and that it could have been posted on any website.

24. The Court has examined a printout of the Neal Website, which continued in operation after the suspensions. The site includes an "online comic" and several message boards. The comic, entitled "Greentree," is described as a satire "for people who live

in Greenwood, Arkansas," having the purpose of expressing "the author's view on life in the small town."

One of the cartoons on the Neal Website was deemed particularly objectionable by the school administrators. This was a series of frames depicting Garvey as "Abominable Vice Principal Garbo," a "Sasquatch" or monster, and Efurd as "E-Firdcom," an intercom wheeled about on a cart. In the first frame, E-Firdcom says to students at the first-day assembly, "Hello students. Welcome back to school. Who's excited to be back?" In the second frame a hand goes up. In the third frame, Garbo holds a smoking gun and the student who raised a hand, and one behind him, have holes in their heads. E-Firdcom asks, "Anyone else?"

The topics established by Neal for the message boards are Academic Standards³, Budget⁴, Academics VS. Athletics⁵, Misc.⁶,

³Described as "[d]iscuss the quality of education at GHS."

⁴Described as "[d]iscuss GHS's budget."

⁵Described as "[d]iscuss the academic aspects of GHS versus the athletic aspects."

⁶Described as "[w]ild card topic."

General⁷, General⁸, Comments and Complaints⁹, National¹⁰, Local¹¹, Whatever¹², and Suggestions¹³. Postings to the message boards reflect lively debates about a wide variety of topics related to Greenwood High School and the community, such as the need for more art classes, smaller classes, more diverse classes, new textbooks, new classrooms, and higher teacher salaries; the scores of students on standardized tests and the school district's "academic report card"; the amount of money spent on athletics as opposed to academics; the First Amendment; the possibility of going to school board meetings, establishing a school club, or using an elected student to review the student handbook, so as to instigate change from within the school; businesses the participants would like to see come into town; the quality of drinking water in town; and even the question of whether the content of the site tends to encourage violence. With the exception of a posting suggesting illegal action

⁷Described as "[t]alk about Greenwood High School in general." At one point, the description of this board included the phrase "the creation of mayhem within the school. . . ." Defendants contend that this phrase has threatening connotations. While it is true that one usage of "mayhem" refers to mutilation of a person's body, the word also has a figurative usage explained in Webster's Third New International Dictionary: "needless or willful damage (as in literary criticism or editorial activity)." The Court finds, given the context of its actual usage on the Neal Site, that the latter usage was intended, i.e., that the writer (who was not Neal or Kuhl) wanted to stir things up at Greenwood High School with the contents of the message.

⁸Described as "[t]alk about Greenwood, Arkansas in general."

⁹Described as "[s]peak your mind about the comic."

¹⁰Described as "[d]iscuss national politics."

¹¹Described as "[d]iscuss local politics."

¹²Described as "[t]alk about anything not covered by other categories including music, movies, or anything else that comes to mind."

¹³Described as "[h]ow can the boards be improved?"

to damage the football field¹⁴, there is nothing of a genuinely threatening nature in the postings, nor is there anything particularly critical of the faculty of Greenwood High School.

25. The Court has also examined the content of the Kuhl Website, which was closed down when Kuhl was suspended. While this site contains much more vulgar language and is indicative of much more pent-up anger on the part of its creator, it covers some of the same subject matter as the Neal Website. Its main focus is its creator's dislike of Greenwood High School and most of the people there. Like the Neal Website, the Kuhl Website offered visitors an opportunity to post their own thoughts to the site.

The Kuhl Website also contained a nascent cartoon or pictorial feature described as the "Bulldog Death of the Week," a takeoff on a song entitled "Kill Your Idols." The bulldog is the mascot of Greenwood High School. This feature was never developed any further than its mere mention, along with a drawing of a bulldog with a mace above its head. In a posting a few days later, Kuhl invited visitors to send in suggestions for the Bulldog Death of the Week, but nothing was ever done to develop the feature.

26. Among the postings by visitors to the websites were three which were viewed as threatening by the school administrators. One was the posting suggested illegal action to damage the High School football field referred to in ¶24. However, neither Neal nor Kuhl was responsible for any of these three postings, and for reasons set

¹⁴See paragraph 26, *infra*.

forth in the Court's conclusions of law, *infra*, these postings are irrelevant to the issues now before it.

27. The Greenwood High School Student Handbook for 2004-05 contains the following provisions regarding suspensions:

Each principal is authorized to suspend students from school for disciplinary reasons. Unless the official imposing the suspension has personally witnessed the infraction, he/she will conduct such investigation into the matter as deemed necessary, including an interview with the subject before imposing the suspension.

1. The custodial parent or guardian will be given written notice of each suspension, which shall include the reasons for the suspension, its duration, and the manner in which the student may be readmitted to school. Such notice will be mailed on the day the suspension is imposed, to the parent or guardian at the address reflected on the school records.

2. Any conduct that tends to be disruptive to the educational program will be grounds for suspension.

* * *

5. A student's disciplinary actions will not be entered on the student's permanent record card. Discipline records shall be treated as confidential and disclosed only to public authorities requesting information in the course and scope of their legal duties.

6. Students missing class work as a result of a school suspension will not be allowed to make up this work. Zeros will be recorded for work missed.

28. Both Neal and Kuhl are honors students with outstanding academic and behavioral records. As a result of their suspensions, each missed three days of school work and tests, and received grades of "zero" on all such missed work and tests. Neither student was able to state with specificity that the missed work caused him to receive a lower grade in a particular class, nor could either

quantify the difference in his grades between the semester preceding the suspension and the semester succeeding the suspension.

29. The parties have stipulated that Neal and Kuhl were not excluded from participating in extracurricular activities because of their suspensions, and that the suspensions and the court appearances related to them will not be counted as unexcused absences against the students.

CONCLUSIONS OF LAW

30. The paramount issue of law presented by these consolidated cases is whether -- and under what circumstances -- a school district can constitutionally regulate off-campus speech by a student.

The Court begins its analysis by inquiring whether the speech in question is "protected speech" as that term is understood in First Amendment jurisprudence. If it is not, the inquiry need go no further.

31. The First Amendment -- made applicable to the states by the Fourteenth Amendment -- prohibits government from controlling the speech of its citizens, with certain narrow exceptions. Obscenity, defamation, fighting words, **R.A.V. v. City of St. Paul, Minnesota**, 505 U.S. 377 (1992), and threats of violence, **Watts v. United States**, 394 U.S. 705 (1969), are not protected forms of speech, although "government's proscription of speech within these categories may not, in general, be based on the content of the speech or the speaker's viewpoint, **Doe v. Pulaski County Special**

School District, 306 F.3d 616 (2002).

32. The Court finds that the speech in question does not fall into one of the unprotected categories. It is not contended that the speech is obscene, defamatory, or that it constitutes fighting words. It is, however, contended that the speech includes threats of violence, which, if correct, would take it out of the realm of protected speech. The Court is not, however, persuaded that any of the speech of Neal or Kuhl on their respective websites constitutes a true threat. A "true threat," in First Amendment terms, is "a statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another." **Doe v. Pulaski County Special School District, 306 F.3d 616 (8th Cir. 2002).**

The on-line comic depicting Garbo shooting two students does not suggest that the speaker intends to shoot anyone, nor can it reasonably be interpreted as a threat that a member of the school administration might shoot anyone. It merely conveys Neal's apparent belief that school is deathly dull, and that the administration does not want it any other way.

The nascent feature identified as the "Bulldog Death of the Week" is so abstract -- and undeveloped -- that no visitor to the Kuhl Website could reasonably have understood it to suggest that violence would be done to anyone at school. About the only thing reasonably clear about this "feature" is that it was obviously not a literal threat of violence to anyone. Surely it would be

facetious to suggest that, because Greenwood High School utilizes the "bulldog" as its mascot, students at Greenwood High School are actually canines of the bulldog breed. The Court believes it would be no less facetious to suggest that the actual death of either a bulldog or a student was being threatened by the use of the words and/or images in the Kuhl Website feature.

The Court therefore concludes that neither the Neal Website on-line comic nor the Kuhl Website "Bulldog Death of the Week" meets the definition of a true threat adopted by the Eighth Circuit Court of Appeals to determine whether speech is protected.

As noted in ¶26, *supra*, there were also three postings by visitors to the websites which were viewed as threats by the school administrators. However, the facts show that neither Neal or Kuhl posted these items. Under applicable federal law, the Court must reject the suggestion that they may be punished for material they did not author. **47 U.S.C. §230(c)(1)** provides that "[n]o . . . user of an interactive computer service shall be treated as the . . . speaker of any information provided by another information content provider." Therefore, the Court may not consider these three postings with respect to the evaluation of the student plaintiffs' speech via their websites. In light of that conclusion, a discussion of the crude and juvenile content of these three postings is unnecessary to this opinion.

Because the speech of Neal and Kuhl on their websites does not fall into one of the unprotected categories, the Court concludes

that it is protected by the First Amendment.

33. Having concluded that the speech in question is protected speech, the Court turns to the issue of whether the District can regulate it -- given the unique nature of the educational setting.

The seminal case on student First Amendment rights is Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), which held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," albeit those rights must be subjected to certain modifications directly related to the educational environment:

A student's rights . . . do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others. But conduct by the student, in class or out of it, which for any reason -- whether it stems from time, place, or type of behavior -- materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

393 U.S. at 512-13 (internal citations and quotation marks omitted).

34. Tinker did not reach the issue of whether a school may constitutionally regulate the speech of a student on his own time, while away from campus and not at any school-related activity. Although only a few lower court decisions since Tinker have touched on the issue, a rather complete and careful analysis of the issue can be found in Killion v. Franklin Regional School District, 136

F.Supp.2d 446 (W.D. Pa. 2001), which involved internet dissemination of speech critical of a teacher. The court therein concluded that speech which occurs off school property, on a student's own time, and which cannot be characterized as "school sponsored," may be regulated, but only under the Tinker rule. That is to say, it may be regulated only if it would substantially disrupt school operations or interfere with the rights of others. Based on the facts appearing herein, the Court is persuaded that the Killion analysis is the correct approach to the First Amendment issue presented in these cases. The speech was on the internet; it was generated in the plaintiffs' homes and not on school property; it was generated on the student's "own time", i.e. not during school hours; and there is no indication that the speech was "school sponsored." Accordingly, as in Killion, the issue here turns on whether the speech in question substantially disrupted school operations at Greenwood High School.¹⁵

35. The testimony tends to show that, during the first week of school, there were some disruptions in the educational environment. In the Court's opinion, however, that testimony establishes neither that the speech of Neal and Kuhl was the cause of those disruptions, nor that the disruptions were substantial within the meaning of Tinker.

36. With regard to the cause of such disruptions as occurred,

¹⁵No party contends that the speech met the other test of Tinker, i.e., that it "interfered with the rights of others."

only one witness, Garvey, testified to any disruptions specifically related to the websites *before* the suspensions. Neither Efurd, nor any teacher who testified, was able to relate any pre-suspension disruptions to the websites. The Court believes the evidence supports other explanations for such disruptions more readily than the notion that the content of the websites caused them. To the extent there were disruptions before the suspensions, they obviously occurred at the very beginning of the school year -- during those first days of "back-to-school" when students are still trying to find their classes, learn their schedules, and reacclimate themselves to the structured environment of classrooms where they must submit to group discipline and instruction -- following directly on the heels of a summer of relative freedom. The Court is not persuaded that the pre-suspension disruptions were caused by the websites.

The proof further indicated that several disruptions involving students occurred after Neal, Kuhl, and the two other students were taken out of class and suspended. The evidence does not, however, establish that these disruptions occurred because of the content of the websites. Some were caused by the way in which the websites were investigated -- Efurd conceded that it always creates a "buzz" when students are taken out of class and kept out. Some arose because students wanted to discuss the suspensions and the First Amendment, i.e., the actions being taken against the authors of the websites and the extent to which their constitutional rights might

be implicated. There was no proof that these attempts at discussion touched upon the content of the websites. Brown observed a group of unruly boys in the lunchroom on one occasion, but she could not legitimately relate their conduct to the websites.

While some members of the faculty were disturbed by what they had been told about the websites, the proof does not support the notion that their understandable concerns caused a disruption of the educational environment. Quite the contrary. The proof indicated that every one of the teachers could -- and did -- maintain control of their classes and steer them away from the discussions students apparently wanted to have. In light of its own observations of the teachers who testified, the Court has no doubt that they and their colleagues would have been able to quell any discussion about the content of the websites had such been attempted, and that they could have done so without losing control or experiencing significant disruptions in those classes.

The Court also believes that, had it not been for Efurd's ill-advised e-mail telling the faculty (erroneously) that the websites contained "threatening statements" about staff members, and the rumors which were circulating among faculty and staff, the teachers would have seen no reason to be greatly concerned. Unfortunately, none of the teachers who testified had visited the websites to see what they contained. Absent the understandable apprehensions generated by the memo and general rumors, the Court believes these capable teachers would have properly ignored the rather crude and

ineffectual attempts to annoy and harass via the internet in the same way they ignore the usual nonsense that a few high school students offer them on a day-to-day basis.

For the foregoing reasons, the Court concludes that any disruptions that occurred were not caused by the content of the Neal and Kuhl Websites.

37. With regard to the extent of the disruptions, Garvey indicated that some twenty students approached him to complain about the websites, and that several teachers expressed their concerns about how the websites were going to affect their classroom performance. In light of the fact that the student body numbered some 750 students, complaints were received from fewer than three percent (3%) of the students. The several teachers who expressed concern to Garvey were not identified, and the teachers who testified failed to establish that the content of the websites disrupted their classes. The Court believes that, in a classroom setting, questions raised by students concerning First Amendment issues might well be viewed more as learning opportunities concerning fundamental rights of citizenship than as substantial disruptions of the educational environment.

Other so-called disruptions at the school were, at most, very minor. Steel testified that, after Neal returned from his suspension, discussion levels were lower in a class that Neal attended, but there was no suggestion that she was unable to carry out her teaching duties because of the lower level of discussion.

Skaggs testified that one student was rowdy on one occasion, but that student was readily calmed by her.

Taking the testimony as a whole, the Court finds that it does not support the conclusion that the Neal and Kuhl Websites "materially disrupt[ed] classwork or involve[d] substantial disorder or invasion of the rights of others," as required under Tinker. The expression of complaints by a small percentage of students and the largely unfounded apprehensions of a few teachers do not constitute a substantial disruption of the educational environment at a high school. Although it cannot be reasonably doubted that some of the content of the websites was calculated to and did cause some discomfort and unpleasantness to teachers, school officials and others, that consequence of free speech cannot justify its prohibition consistent with the terms of the First Amendment. Cf. Tinker, 393 U.S. at 738 ("for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint"); Holloman ex rel. Holloman v. Harland, 370 F.3d 1252 (11th Cir. 2004)("student expression may not be suppressed simply because it gives rise to some slight, easily overlooked disruption, including but not limited to a showing of mild curiosity by other students, discussion and comment among students, or even some hostile remarks or discussion outside of the classrooms by other students")(internal

citations and quotation marks omitted).

38. Although it was not initially advanced as a basis for the suspensions, the Court has also considered whether the content of the websites constituted "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities," so as to justify regulation of the websites under Tinker. That is to say, could Efurd and Garvey reasonably have concluded that the websites posed a genuine risk of substantial disruption of the educational environment, even if such disruption did not occur?

The Court finds that they could not have so concluded. The fact that the content of the websites was highly critical of school administration would not justify such a conclusion. Garvey acknowledged what common sense teaches: school administrators are frequently the target of criticism and even ridicule by students. Common sense also counsels that well educated, capable teachers and school administrators are more than adequate matches for those few students who would seek to level criticism and ridicule at them.

While threats of violence would certainly justify reasonable forecasts of substantial disruption of the educational environment, the Court finds nothing on the websites attributable to Neal or Kuhl that could reasonably be characterized as a true threat of violence.

The Court is not unsympathetic to concerns about violence in the public schools and confidently believes that responsible school

administrators and teachers will act quickly and competently to meet and handle such threats if and when they occur. That being said, it must also be recognized that responsible school administrators and teachers must also be able to distinguish between true threats and non-threatening statements couched in less-than-temperate language. This task is increasingly difficult in today's society. As was observed by Judge Heaney in his dissent in Doe v. Pulaski County Special School District, 306 F.3d 616 (2002), "[t]oday's teenagers witness, experience, and hear violence on television, in music, in movies, in video games, and for some, in abusive relationships at home. It is hardly surprising that such violence is reflected in the way they express themselves and communicate with their peers, particularly where adult supervision is lacking."

Whatever the motivations of these otherwise seemingly intelligent young men, the content of their websites -- which included expressions such as "kill your idols" and depictions such as the shooting by Garbo -- was crude, vulgar, and juvenile in many respects. However, viewed in context and in light of applicable precedent, the Court believes a reasonable viewer would find them nothing more than crude reflections of Neal's and Kuhl's views of the culture in which they were raised. That conclusion is buttressed by Efurd's concession at trial that he knew that neither Neal or Kuhl had made threatening statements on the websites.

39. For all the foregoing reasons, the Court finds that the speech of Neal and Kuhl on their respective websites was protected

by the First Amendment; that it did not substantially disrupt the educational environment at Greenwood High School; and that it was not reasonable to expect that it would do so.

The Court further finds that by subjecting Neal and Kuhl to punishment for the speech on their respective websites, Efurd and Greenwood School District violated rights of Neal and Kuhl protected by the First Amendment.

The Court further finds that Garvey did not violate those constitutionally protected rights, inasmuch as there was no evidence that he made the decision to punish Neal and Kuhl.

40. The Court's conclusion that the speech in question may not be constitutionally prohibited under existing precedent is not meant to suggest that the Court condones that speech, or believes it to be otherwise appropriate in a civilized society. Instead, the holding is simply a ratification of the limitations the people have placed upon the powers granted to government. It is perhaps appropriate to observe in passing that, frequently, cases involving constitutionally protected rights arise out of conduct and situations concerning which popular opinion holds that the seeker of constitutional protections is unworthy of them. For example, the suppression of a confession by one who is, in the minds of the majority, "obviously guilty" is loudly denounced -- while the fact that, day in and day out, the constitutional protection thus being upheld protects the vast majority of innocent Americans goes unnoticed. So it is with the treasured right of free speech which

is constitutionally protected from government regulation or encroachment by the First Amendment. All too often, this precious and vital constitutional right comes to our attention only when it is being exercised by folks with whom we disagree -- or by folks who say crude and boorish things. It is well to reflect upon the notion that the overall worth and value of unfettered speech -- recognized by the Founding Fathers -- vastly outweighs that part of its price which involves putting up with the discomfort and unpleasantness caused by unpopular expression.

41. In addition to their First Amendment claim, plaintiffs argue that the text of the Student Handbook, to the extent that it was advanced as a reason to support the suspensions of the plaintiffs, suffers from unconstitutional vagueness and over breadth. The Court does not find it necessary to address these issues, however, given that the dispute is resolved on other grounds. The real issue of how far a school can go in regulating off-campus speech is determined by the Constitution and existing case law, and a school district cannot by the creation or implementation of its own rules, override that precedent.

42. Plaintiffs also initially asserted a procedural due process claim in connection with the manner in which their suspensions were handled. They later decided to abandon this claim, however, and the Court will therefore not address it.

43. Turning to the issue of remedies, the Court finds that Efurd and Greenwood School District should be enjoined from

punishing Neal or Kuhl on the basis of anything their websites contained up to the date of trial. This injunction prohibits Efurd or the District (including any of its agents or employees) from placing any information in the students' academic records about the websites or the suspensions; making any school record of the websites or the suspensions; and commenting about the websites or suspensions to anyone who contacts the District for recommendations about the student plaintiffs.

The Court will further enjoin Efurd and Greenwood School District (including its agents and employees) from punishing Neal or Kuhl for anything that might be added to their websites after the date of trial, unless such additions can be shown to substantially disrupt the educational process or to present a legitimate threat of substantial disruption.


With regard to the request that the Court direct the District to allow Neal and Kuhl to make up work missed during their suspensions, it appears that to do so would present significant logistical problems. The missed days, missed work, and missed tests are, essentially, history by now. The semester is over and final grades have been computed. The evidence suggests that the grades of Neal and Kuhl were not greatly impacted by the missed work, since each has maintained a grade average in the approximate range of what he experienced before the suspensions. The Court, therefore, declines to *enjoin* the District to permit Neal and Kuhl to make up school work missed during their suspensions but, rather, only

range of what he experienced before the suspensions. The Court, therefore, declines to *enjoin* the District to permit Neal and Kuhl to make up school work missed during their suspensions but, rather, only strongly suggests that such makeup work *should* be allowed, if possible, and if desired by Neal and Kuhl.

44. Plaintiffs also seek an award of attorney's fees, and the Court finds that such an award is appropriate, under 42 U.S.C. §1988, inasmuch as plaintiffs are the prevailing parties herein. Plaintiffs are directed to file their fee petition within fourteen days of the date of this Memorandum Opinion, and defendant is directed to file any desired response within ten days thereafter.

45. A Judgment reflecting the decisions of the Court as embodied in this Memorandum Opinion is being filed concurrently herewith.

IT IS SO ORDERED, this 18 day of February, 2005.



JIMM LARRY HENDREN
UNITED STATES DISTRICT JUDGE